IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1057

ESTATE OF SALLYE LIPSCOMB FRENCH
JOHN W. KEY, *et al.*,

Appellants,

v.

MICHAEL M. DOYLE, *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT OF COLUMBIA
COURT OF APPEALS

BRIEF FOR JOHN W. KEY, *ET AL.*

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OPINION BELOW

The Opinion of the District of Columbia Court of Appeals of November 1, 1976 is reported at 104 Wash. L. Rptr. 2061 (1976) and at 365 A.2d 621. (A. 16) The Opinion and Order of the Superior Court of the District of Columbia of February 13, 1975 is unreported. (A. 16)

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on November 1, 1976. On January 26, 1977, the Notice of Appeal to the Supreme Court of the United States was filed in the District of Columbia Court of Appeals. This Court postponed jurisdiction on March 21, 1977. The jurisdiction of this Court rests on 28 U.S.C. 1257(1).

STATUTE INVOLVED

18 D.C. Code §302:

> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. D.C.C.E. §18-302, vol. 10, page 51.

QUESTIONS PRESENTED

1. Does Section 18-302 of the District of Columbia Code violate the free exercise clause of the First Amendment?

2. Does Section 18-302 of the District of Columbia Code create a classification which bears a rational relationship to its purpose so as not to violate the equal protection-due process guarantee of the Fifth Amendment?

STATEMENT OF THE CASE

Sallye Lipscomb French executed a will on October 13, 1972, in which she left one-third of her residuary estate to appellee Calvary Baptist Church and one-third to appellee St. Matthew's Cathedral. She died on November 2, 1972, less than 30 days after the execution of the will. Michael M. Doyle, executor of the estate of Sallye Lipscomb French, filed a Complaint for Instructions in the Superior Court of the District of Columbia (Probate Division) (A. 5). There was a stipulation as to the material facts of the case and cross motions for summary judgment were filed by all the parties to the action. Hearing on the motions for summary judgment was had before Judge Theodore R. Newman, Jr. on January 29, 1975. On February 13, 1975, Judge Newman issued an Opinion and Order which found that 18 D.C. Code §302 violated the First and Fifth Amendments and which ordered that the estate of the decedent, Sallye Lipscomb French, be administered without regard to 18 D.C. Code §302 (A. 16). Appellants herein, the heirs-at-law of Sallye Lipscomb French, appealed from that Opinion and Order to the District of Columbia Court of Appeals which affirmed the decision of the Superior Court (A. 16). The appellate court held that the statute is invalid under equal protection and due process principles of the Fifth Amendment and therefore did not consider the First Amendment issues.

SUMMARY OF ARGUMENT

Section 18-302 of the District of Columbia Code is constitutional and does not violate either the First or Fifth Amendments of the Constitution of the United States.

I.

While the opinion of the District of Columbia Court of Appeals does not rest on First Amendment grounds it does affirm that of the Superior Court of the District of Columbia which held, in part, that the statute violates the free exercise of religion provisions of the First Amendment. The First Amendment issue is therefore addressed herein.

Section 18-302 regulates the testamentary transfer of property, a secular activity. The states have a legitimate interest in establishing inheritance laws and it is within their power under the Tenth Amendment to do so. The statute's effect is very limited, voiding only those testamentary transfers made within thirty days of testator's death. There are other areas in which the states' exercise of its police power has an indirect effect on the exercise of religion (e.g. Sunday Closing Laws) which have been sustained. Similarly 18 D.C. Code 302's indirect and limited effect on religions does not violate the free exercise clause of the First Amendment.

II.

Section 18-302 does not violate the equal protection-due process concepts of the Fifth Amendment as there is a rational basis for the statute.

The statute regulates a secular activity and, as indicated above, does not infringe on a fundamental constitutional right; nor does it contain a suspect classification. Therefore, a compelling state interest for the classification need not be demonstrated and the strict scrutiny test does not apply. The appropriate test is the rational basis test. This test is satisfied as evidenced by the stated purpose of the statute

> to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants. D.C. Code Encyclopedia, §18-302, page 54.

The statute can be said to create two classifications: (1) testators who die within thirty days of making their will vis à vis all other testators and (2) religious beneficiaries vis à vis all other beneficiaries. Both classifications bear a rational relationship to the purpose of the statute, the latter being particularly relevant as it is only a religion which offers salvation of the soul.

ARGUMENT

I.

18 D.C. CODE §302 REGULATES A SECULAR ACTIVITY AND DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The First Amendment requires that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. 397 U.S. at 669.

> No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement. 397 U.S. at 670.

Section 18-302 neither respects the establishment (or de-establishment) of religion nor interferes with its free exercise. Like the tax exemption granted religion, *Walz v. Tax Commission*, 397 U.S. 664 (1970), and the Sunday Closing Law, *Braunfeld v. Brown*, 366 U.S. 599 (1961), it is legislation having a secular purpose and dealing with a secular activity. It does not deny support to religions. Indeed, only a very limited group of gifts, those made by will executed within thirty days of testator's death, are eliminated. Nor is there evidence that over 100 years of the statute have resulted in the establishment or de-establishment of church or religion.

While the Exercise Clause prohibits the placement of governmental restrictions on the freedom of belief, the freedom to act in accordance with one's religious convictions is not totally free from legislative restrictions. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Braunfeld v. Brown, supra*, at 603. *Braunfeld* upheld the Sunday closing law despite the economic burden placed on Orthodox Jewish merchants whose religion prohibits them from working on Saturday.

> [I]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. 366 U.S. at 606.

Any disadvantage caused by Section 18-302 is far less direct and objectionable than that associated with the Sunday Closing Law, for Section 18-302 affects *all* religious sects equally.

The states have a legitimate interest in and possess extensive power to establish rules of inheritance. *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed. 2d 288 (1971). The disposition of property by will is governed solely by state statute. As the Supreme Court noted in *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503, 94 L.Ed. 675 (1949), a long line of cases has

> consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. 339 U.S. at 91-92, 70 S.Ct. at 506, 94 L.Ed. at 681.

Thus, testamentary disposition of property is a secular activity which Congress (with respect to the District of Columbia) has deemed to be within its proper legislature purview; it does not constitute the exercise of religion.

Whether the Exercise Clause gives any "rights" to religions is questionable. The Clause was framed with the individual in mind and had as its purpose the prevention of persecution on account of one's religious beliefs or activities. It is true that religions rely on donations. But it is difficult to see how the very limited restriction of §18-302 constitutes an interference with religion's exercise of religion if, indeed, the First Amendment embodies such a concept at all.

Section 18-302 is not unique in its effect of restricting gifts to religious organizations. A spouse's renunciation of a bequest or devise under D.C. Code §19-113, for example, could have a similar effect on bequests in the same will to religious organizations. The First Amendment cannot be read to invalidate any such statute which might have the indirect effect of restricting gifts to religious organizations.

II.

18 D.C. CODE §302 DOES NOT VIOLATE THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

Bolling v. Sharpe, 347 U.S. 497 (1954) reads the equal protection clause of the Fourteenth Amendment into the due process clause of the Fifth Amendment to apply it to the District of Columbia. Any unjustifiable discrimination is violative of due process under the test.

18 D.C. Code §302 regulates a secular activity, the testamentary transfer of property. This is an activity in which the state has a legitimate interest. *Labine v. Vincent, supra.* The purpose of the statute as stated in the Encyclopedic Commentary of the D.C. Code Encyclopedia, is "to prevent improvident gifts to the exclusion of the testator's lawful heirs and next of kin when the testator is weak and in apprehension of death, or . . . to prevent a testator under the fears incident to death, from disposing of his estate to the prejudice of his descendants." D.C. Code Encyclopedia, §18-302, page 54. The statute has a very limited and indirect effect on religion and therefore does not regulate a fundamental interest protected by the First Amendment.

18 D.C. Code §302 does not discriminate among religions nor does it tend toward the establishment (or de-establishment) of religion. In fact it is questionable whether 18 D.C. Code §302 makes a classification at all and therefore whether the equal protection concept applies. It is part of a greater body of legislation which prescribes various conditions which must be met in order for a testamentary disposition to be valid. *See* 18 D.C. Code 101 *et seq.* "Any of the preconditions of valid execution of a will . . . can be manipulated into 'classifications.' " *In Re Estate of Cavill*, 329 A.2d 503, 508 (1974) (J. Pomeroy, dissenting).

Assuming, however, that 18 D.C. Code §302 creates classifications (see Summary of Argument, *supra*), they do not violate the equal protection aspect of the Fifth Amendment. Because, as indicated above, the statute does not regulate a fundamental interest protected by the First Amendment there need be no showing of a compelling state interest. The appropriate test of its validity is the rational basis test.

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on groups wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.... *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961).

The Court of Appeals at page 6 of its opinion quotes from *Reed v. Reed*, 404 U.S. 71, 76 (1971). At pages 75-76 of *Reed v. Reed, supra*, the following language appears:

> In applying [the Equal Protection] clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (Citations omitted.) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria *wholly unrelated* to the objective of that statute. (Emphasis supplied.)

Here, not only are the classifications of the statute related to its objective but they bear a most rational relationship to the express legislative purpose (the "deathbed" theory, cited *supra*). Such concern for the public welfare is a proper governmental objective and in no way constitutes arbitrary action on the part of Congress.

The Court of Appeals notes at page 8 of its opinion that "Many persons who may be in an equal position to influence the testator, such as lawyers, doctors, nurses, physicians, and charitable organizations, are not included in the statute. *See In re Small*, [100 Wash. L. Rptr. 453 (D.D.C. Feb. 7, 1972)]." Although the *position* may indeed be equal, the *influence* is far from equal. Religious organizations, unlike other persons or organizations, appeal to a testator's interest in the salvation of his soul. They can exert a particularly strong and unique influence on one whose death is but thirty days away. It was to avoid such deathbed bequests that the statute was passed.

The "strict scrutiny" test is applied when discrimination is shown to infringe on fundamental constitutional rights. *Shapiro v. Thompson*, 394 U.S. 618 (1969). As already indicated 18 D.C. Code 302 constitutes no direct or substantial infringement of a fundamental constitutional right. While it is clear that a statute placing a condition upon the exercise of the right to vote requires such strict review, *Dunn v. Blumstein*, 405 U.S. 330 (1972), not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review, *Bullock v. Carter*, 405 U.S. 134 (1972). Thus it appears that only in cases where the restriction imposed by law "has a real and appreciable impact on the exercise of the franchise," *Bullock, supra* at 144, will the Court invoke the strict scrutiny test. The right to vote is no less fundamental a right than that regarding the free exercise of religion.

The "strict scrutiny" test is also applied when statutory classifications are based on suspect criteria, i.e. when the class possesses an "immutable characteristic determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) or when the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process," *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See Johnson v. Robison*, 415 U.S. 361 (1974). Neither is the case with the classifications created by the instant statute.

Section 18-302, like the ordinance in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), prohibiting the sale of foodstuffs from pushcarts in the French Quarter by all vendors except those who had already been in business there for eight years, is in the nature of an economic regulation. When such a regulation

> is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical

> exactitude. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines. . . . in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment. (Citations omitted.) 427 U.S. at 303-304.

The fact that the statute may sometimes cause harsh results does not render it unconstitutional. It is designed to eliminate the very real danger of a testator's exercising judgment clouded by apprehensions regarding salvation.

> In those cases where the rational basis test is appropriate, the concepts of overbreadth and underbreadth are irrelevant and there exists no requirement that the state demonstrate a statute drawn with mathematical precision. *In Re Estate of Cavill, supra* at 509 (dissent), citing *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed. 2d 491 (1970).

At page 8 of the Opinion of the Court of Appeals is expressed concern about an "irrebuttable presumption" of undue influence contained in the statute. Like the Pennsylvania statute in *In Re Estate of Cavill*, supra, 18 D.C. Code §302 Creates not a presumption but an express proscription against certain testamentary gifts. As J. Pomeroy (dissenting) in *Cavill* observed: "This distinction between a conclusive presumption and a flat prohibition is not one without a difference when the constitutional implications of a state's legislative action are at stake." 329 A.2d at 510.

Since the statute expresses a proscription, there is no denial to the religious beneficiaries' right to be heard

because they had no such right. Before the guarantees of procedural due process attach, a complaining party must demonstrate that he possesses some recognized interest of life, liberty, or property. *Board of Regents v. Roth*, 408 U.S. 564, 569-570, 92 S.Ct. 2740, 33 L.Ed. 2d 548, 556-557 (1972). Appellees have nothing more than an abstract need or desire or unilateral expectation of a benefit and consequently do not possess an interest sufficient to entitle them to be heard. *Board of Regents v. Roth, supra.*

Since the statute does not infringe on any First Amendment right (or contain suspect classification), since there is a rational basis for the classification, and since the protection of the heirs and next of kin is a legitimate governmental objective, the statute must stand free from the interference of the judicial branch.

> In an age when the hope of salvation may be less vivid and the fear of damnation less acute than formerly it was, one may disagree with the wisdom or necessity of the provision before us today; but wisdom—whether that of this Court or the legislature—is not determinative of legislative power. *In Re Estate of Cavill, supra* at 509 (dissent).

CONCLUSION

It is therefore respectfully submitted that the judgment of the District of Columbia Court of Appeals be reversed.

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May 1977.